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No. 82-945

In the Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. AND SURAK LEATHER COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an employer constructively discharged employees known to be illegal aliens by reporting the employees to the Immigration and Naturalization Service, resulting in their arrest and immediate departure from the United States.

2. Whether the remedial order in this case is appropriate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 672 F.2d 592. The decision and orders of the National Labor Relations Board (Pet. 61a-83a, 40a-52a) are reported at 234 N.L.R.B. 1187 and 246 N.L.R.B. 788.

JURISDICTION

A petition for rehearing with suggestion for rehearing en banc was denied on May 5, 1982 (Pet. App. 36a-39a), and the judgment of the court of appeals was entered on July 12, 1982 (Pet. App. 25a-33a). On September 17, 1982, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 6, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3.

STATEMENT

1. Petitioners Sure-Tan, Inc. and Surak Leather Company are leather processing firms located in Chicago, Illinois.[1] At the time in question, petitioners employed about 11 workers, most of whom were Mexican nationals who were in the United States without visas or working permits. In July 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America began to organize the Company's employees. The union election petition led to a union victory in a December 10, 1976 Board election. On January 19, 1977, the Board notified petitioners of the union's certification as the employees' collective bargaining representative. (Pet. App. 2a).[2]

The day after receiving notice of the union's certification, petitioners wrote the Immigration and Naturalization Service suggesting that INS should check the status of several of petitioners' Mexican employees (Pet. App. 8a-9a, 68a-69a). On February 18, 1977, INS agents visited the Company's plants, discovered that five employees were in the United States illegally, and had them arrested and removed from the premises (Pet. App. 9a, 69a).[3] Each of the five employees executed INS Form I-274, acknowledging that

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[1]For purposes of the National Labor Relations Act, petitioners are a single, integrated employer (Pet. App. 67a).

[2]Petitioners' refusal to bargain with the union was found to be an unfair labor practice in a prior proceeding. 583 F.2d 355 (7th Cir. 1978).

[3]The five employees are Juan P. Florez, Francisco Robles, Ernesto Arreguin, Sacremento Serrano, and Arguimiro Ruiz (Pet. App. 9a, 68a-69a).

he was a Mexican citizen illegally present in this country (Pet. App. 9a). By executing this form, the employees accepted INS' grant of voluntary departure in lieu of deportation (Pet. App. 9a-10a). By the end of the day (February 18), the five employees had been placed on a bus bound for El Paso, Texas (Pet. App. 11a, 69a), and from there they were to return to Mexico. On March 29, 1977, petitioners sent letters in English by regular mail to the five employees at their last known address in Mexico. Petitioners offered to reinstate the employees, provided that doing so would "not subject Sure-Tan, Inc. to any violations of United States immigration laws." The offer remained open until May 1, 1977. There was no evidence that any of the letters were received. (Pet. App. 20a, 80a.)

2. Adopting the findings of the administrative law judge, the Board found that petitioners had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by requesting the INS investigation and thereby forcing the departure of the five employees *solely* because they supported the union.[4] The Board held that aliens are employees under Section 2(3), 29 U.S.C. 152(3), and therefore are entitled to the protection of the Act (Pet. App. 62a-63a, 74a-75a). The Board also found that the requisite factual elements of a "constructive" discharge were present: (1) the employees' forced departure was the proximate result of petitioners' request for an INS investigation, and (2) petitioners' request, made with knowledge of both the employees' immigration status and

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[4]The Board also found that petitioners' repeated threats, interrogations and other coercive statements during the union organizing campaign violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1) (Pet. App. 61a-62a, 73a-74a) and that their harassment and reprimand of Albert Strong, another of petitioners' employees, violated Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4) (Pet. App. 61a-62a, 75a-77a). No issue concerning these findings is raised in this Court.

the union's recent certification, and against the backdrop of petitioners' Section 8(a)(1) conduct, was motivated by anti-union considerations (Pet. App. 62a, 74a-75a).

The Board concluded that petitioners' post-discharge letter offering each discriminatee "full and complete reinstatement to [his] former job, provided only that [his] re-employment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws" was not an unconditional reinstatement offer (Pet. App. 20a n.3).[5] To remedy the unlawful constructive discharge of the five undocumented aliens, the Board entered a reinstatement and backpay order (Pet. App. 63a-64a).[6]

Later, over the dissent of two Members, the Board denied the General Counsel's motion to "clarify" its order to limit any offer of reinstatement to discriminatees who lawfully re-entered the country and to limit backpay to periods of lawful presence (Pet. App. 54a-60a). The Board explained that "the backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer," that

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[5]The administrative law judge had found the March 29 offer deficient on grounds that the time limit for acceptance was too short (a six-month period was recommended) and that, given the manner of delivery, there was some question whether the letters were received (Pet. App. 79a-80a). The Board noted but did not pass on these points (Pet. App. 63a n.3).

[6]Assuming that the employees had remained in Mexico since their discharge and thus were unavailable for work, the Administrative Law Judge did not order backpay. Assuming further that the employees would encounter difficulty re-entering this country, he recommended that the reinstatement offers be left open for six months. (Pet. App. 80a). The Board held that these factual assumptions were "unnecessarily speculative" and unsupported by any evidence in the record. Accordingly, the Board ordered the "conventional remedy of reinstatement with backpay" and held that the employees' actual availability for work since their discharge would be determined in compliance proceedings. (Pet. App. 63a.).

backpay would be tolled during the time that employees are unavailable for work due to their absence from the country, and that if the discriminatees are not immediately located, backpay should be placed in an escrow account "for the normal 2-year period"[7] (Pet. App. 41a-42a). The Board added that, since there was no showing that any discriminatees had violated any of the criminal provisions of the Immigration and Nationality Act (INA) 8 U.S.C. 1101 *et seq.*, it was "unnecessary at this time to tailor our remedy to the possibility that implementation of our order would result in such violations"; any modifications of the Order which might be required could properly be deferred to compliance proceedings (Pet. App. 44a).

3. The court of appeals upheld the Board's unfair labor practice findings (Pet. App. 3a-8a, 24a). It agreed with the Board that by reporting the employees to INS petitioners had constructively discharged them and that, in doing so, petitioners were motivated by blatant anti-union animus (Pet. App. 10a-15a). The court rejected petitioners' assertions that they were unaware that the employees were illegal aliens, that the forced termination resulted from the employees' illegal status rather than petitioners' report to INS, and that petitioners were legally obligated to disclose the presence of the alien employees to INS (Pet. App. 11a-14a). The court concluded that "an employer has no right to rely on a 'moral obligation' to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3)." As the court explained, to rule otherwise "would encourage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy" (Pet. App. 13a-14a).

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[7]See Section 10644 of the NLRB Case Handling Manual (Pt. III).

The court also agreed with the Board that reinstatement and backpay were appropriate remedies for the unlawful constructive discharges, rejecting petitioners' claim that this remedy would encourage the employees to re-enter the United States unlawfully. The court noted that, since the discriminatees had not been deported, the felony provisions of the INA, 8 U.S.C. 1326, were inapplicable and thus the discriminatees might lawfully return to this country to reclaim their jobs. Nor, as a practical matter, would the Board's remedial order provide any significant incremental inducement to unlawful re-entry (Pet. App. 17a-18a.) Accordingly, the court concluded that "the * * * grant of the conventional remedy of backpay and reinstatement does not clearly flout the immigration laws" (Pet. App. 18a).

The court also found reinstatement and backpay consistent with the policies of the National Labor Relations Act. It pointed out that the discriminatees' illegal immigration status did not interfere with their ability to perform work or with harmonious employer-employee relations (Pet. App. 19a). The court added that "[i]t would be anomalous to encourage the honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies" (*ibid.*). Moreover, the court noted that, since the constructive discharges undermined bargaining strength in the crucial period after the union's certification, reinstatement and backpay for the aliens were necessary to protect the rights of the non-alien employees in the bargaining unit (*ibid.*).

The court modified the Board's order to require petitioners to reinstate the discriminatees only if they are "legally present and legally free to be employed in this country when they offered themselves for reinstatement." Noting that, absent anti-union animus, an employer may refuse employment if the applicant does not have working papers, the

court concluded that, "particularly because of the attention now focused by the government on these discriminatees and their employer, it is appropriate for this employer to remind the discriminatees that they may not legally enter the United States to claim these jobs without proper documents." Accordingly, the court ruled that such a "reminder" in petitioners' March 29, 1977 reinstatement offers did not render them defective (Pet. App. 21a-22a).

Nonetheless, the court agreed with the administrative law judge that the March 29 offers were inadequate because they (1) were not written in Spanish, (2) "were not delivered * * * in a manner allowing verification of receipt," and (3) "did not give the discriminatees a reasonable time to consider the offer and make arrangements for legally entering the United States" (Pet. App. 22a). The court rejected the administrative law judge's suggestion that six months would constitute a reasonable time to keep the offer open, however, and held that "the offer should remain open for a period of four years" (*ibid.*). New offers of reinstatement complying with these requirements "terminate the possible accrual of backpay" (Pet. App. 23a).

Finally, consistent with the requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States, the court modified the Board's order to make clear "(1) that * * * in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States and (2) that backpay need not be placed in escrow for more than one year" (Pet. App. 23a, 28a-29a). Also, concerned that the discriminatees would not be lawfully present and available for work in the United States at any time prior to petitioners' valid offer of reinstatement (which it had held would toll the accrual of backpay), the court provided that the

employees should receive "a minimum of six months backpay (of course subject to clearly mandatory and conclusively established setoffs, if any)." Pet. App. 23a-24a, 28a-29a. Otherwise, the losses suffered by the discriminatees because of petitioners' unlawful conduct would remain completely unremedied.[8]

ARGUMENT

Petitioners contend that reporting the five employees to INS was not a constructive discharge and that, in any event, certain aspects of the remedy imposed by the court of appeals are inconsistent with the policies of the immigration laws. There is no merit to any of those contentions. Accordingly, and since the propriety of the remedy provided here turns on the particular facts of this case, further review is unwarranted.[9]

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[8]The Seventh Circuit explained why it believed a minimum backpay award was essential to "effectuat[e] the policies of the [National Labor Relations] Act," under the circumstances of this case. Pet. App. 23a. The court initially enforced the Board's order, as modified in other respects, and invited "the Board, *if it sees fit*, to modify [the order] further by setting a minimum period of six months during which backpay will be awarded in any event" (Pet. App. 24a, emphasis added); it added that it would "also grant enforcement of the order as so modified" (*ibid.*). The Board's proposed judgment order, however, left the court "uncertain whether the Board [had] adopted [the] suggestion" (Pet. App. 28a). The court then modified the judgment to make it clear that the discriminatees were entitled to a minimum award of six months' backpay. The Board has accepted this modification in this case, and its proposed judgment order (Pet. App. 30a-35a) was intended to grant the discriminatees the suggested minimum backpay award. The Board did not purport to articulate a general remedial policy for such cases, however, since it was unnecessary to do so under the terms of the court's remand order.

[9]The Board long has held that an illegal alien is an "employee" as defined in Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3). See *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976); *Handling Equipment Corp.*, 209 N.L.R.B. 64, 65 n.5 (1974); *Lawrence Rigging, Inc.*, 202 N.L.R.B 1094, 1095 (1973); *Seidmon, Seidmon,*

1. Petitioners' claim (Pet. 16-17) that the employees' forced departure was the result of the employees' illegal status and not petitioners' discriminatorily motivated report to INS is, as the court of appeals observed, "specious" (Pet. App. 12a). "INS has a legal duty to uphold the Federal immigration laws" (Pet. 16), but it was petitioners' letter to INS advising the agency of the 5 employees' status which was the proximate cause of their departure. In these circumstances—where petitioners were aware of the employees' illegal immigration status, profited from their labor, and waited until the employees secured union representation to request an INS investigation—it is clear that "[t]he immigration laws have been conveniently employed to impose the ultimate penalty of discharge * * *" (Pet. App. 15a).[10]

2. Petitioners assert (Pet. 10, 12 n.6) that the court of appeals' award of a minimum of six months' backpay conflicts with the policies of the Immigration and Nationality

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Henkin & Seidmon, 102 N.L.R.B. 1492, 1493 (1953). The only courts that have addressed the issue have accepted the Board's interpretation. See *NLRB* v. *Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979); 583 F.2d 355, 359 (7th Cir. 1978). Petitioners do not dispute this settled construction of the statute.

Nor do petitioners question the propriety of modifying the Board's order to prescribe a minimum backpay award in light of the court's "uncertain[ty]" (Pet. App. 28a) as to whether the Board had intended to accept the court's previous suggestion that such an award be made (see Pet. App. 24a). Compare *NLRB* v. *Food Store Employees*, 417 U.S. 1 (1974). In any event, as already explained, the proposed judgment order (see Pet. App. 30a-35a) was intended to provide for such an award.

[10]Contrary to petitioners' suggestion (Pet. 16), the court of appeals used the phrase "voluntary departure" to describe the INS Form I-274 alternative to deportation (Pet. App. 9a, 17a), *not* the employees' termination of their employment with petitioners and the employees' departure from the United States. The court left no doubt that the termination and departure were entirely involuntary, resulting directly from petitioners' unlawful conduct (Pet. App. 12a-15a).

Act because it assumes that the illegal aliens had a right "to remain in the United States for six additional months, and provides the illegal aliens with a strong incentive to return illegally to this country." The court's award was not premised on any right of the discriminatees to remain in this country. On the contrary, the court of appeals reasoned that "but for" petitioners' unfair labor practice, the illegal aliens might have remained undetected by INS and, therefore, employed by petitioners for at least six months. Pet. App. 19a, 23a-24a, 28a. Petitioners have suggested nothing that casts any doubt on the reasonableness of that conservative estimate. Nor would backpay operate as a significant additional inducement to illegal entry. The court of appeals approved petitioners' formulation of the reinstatement offer, which conditioned reinstatement on lawful re-entry (Pet. App. 22a, 31a). Moreover, as the court noted, there are substantial practical considerations that make it unlikely that any of the discriminatees will return to the United States illegally in order to obtain backpay (Pet. App. 18a). Accordingly, contrary to petitioners' contention (Pet. 12), the court's backpay award is not inconsistent with either the terms or the policies of the immigration laws.[11]

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[11]Congress recently considered but failed to adopt legislation that would have made it unlawful to employ illegal aliens. See, *e.g.*, H.R. 6514, 97th Cong., 2d Sess. (1982); H.R. 5872, 97th Cong., 2d Sess. (1982); S. 2222, 97th Cong., 2d Sess. (1982). If Congress were to enact such legislation, the Board would have to address the question of the appropriate remedy in cases such as this in that very different legal context.

Petitioners' reliance (Pet. 12 & n.6) on *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942), is misplaced. In *Southern Steamship*, the Court held that the Board abused its discretion in ordering reinstatement of employees who had been discharged for participating in a strike that violated federal criminal statutes. Here, however, the employees were discharged for supporting a union, activity that violates no federal statute. Indeed, that activity is protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

Nor is there merit to petitioners' claim (Pet. 13-15) that the six month-minimum backpay award is "punitive." As already noted, the minimum backpay award rests on the court's conclusion that the discriminatees would have continued in petitioners' employment for at least six months if petitioners had not reported them to INS (Pet. App. 28a). It is plain beyond serious dispute that each of the aliens would have continued to work for some period beyond February 18, 1977, but for petitioners' unlawfully motivated report to INS. It is equally plain, therefore, that each of the aliens suffered some injury from petitioners' unfair labor practices, although it is impossible to determine precisely how much. As this Court has noted in another context, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury * * * it has itself inflicted." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566-567 (1981); see *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts"). Here, the backpay award serves the wholly legitimate remedial purpose of compensating the injured employees and vindicating their rights under the National Labor Relations Act. See, *e.g.*, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). To the extent the award has the incidental effect of deterring future violations it is also legitimate. Compare *id.* at 265, with *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 11-13 (1940).

Finally, contrary to petitioners' contention (Pet. 18-20), the requirement that petitioners' reinstatement offers be held open for four years, be written in Spanish, and be delivered so as to verify receipt are not inappropriate in the

circumstances of this case. The discriminatees are Spanish-speaking residents of Mexico; receipt of the offers of reinstatement through regular mail is uncertain; and "legal re-entry into the United States may require years of [legal] effort" (Pet. App. 22a, 80a). Thus, the unusual features of the remedy simply reflect the particular facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.[12]

Respectfully submitted.

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[12]Petitioners do not challenge the Board's finding that the letter to INS was motivated by anti-union animus, so there is no reason to withhold action on this petition pending disposition of *NLRB* v. *Transportation Management Corp.*, cert. granted, No. 82-168, (Nov. 15, 1982). Nor are the issues in this case sufficiently similar to those raised in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, cert. granted, No. 81-2257 (Oct. 18, 1982), to warrant delaying action on the petition pending disposition of that case.

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